LIBRARY
SUPREME COURT, U. S.

FILED
DEC 28 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 116 ?

C. E. HESTER, et al.,

Petitioners,

versus

ZELMA WYCHE,

Respondent.

Petition for Writ Of Certiorari to the United States
Fifth Circuit Court of Appeals

JACK P. F. GREMILLION
Attorney General
State of Louisiana

WILLIAM D. SCHEULER
Assistant Attorney General
301 Supreme Court Building
New Orleans, Louisiana 70112

DOROTHY D. WOLLESTTE
Assistant Attorney General
301 Supreme Court Building
New Orleans, Louisiana 70112

THOMPSON L. CLARKE
District Attorney for the
Ninth Judicial District
St. Joseph, Louisiana 71366

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Reasons for Granting Writ	8
Conclusion	16
Certificate of Service	17
Exhibit A, Opinion of Fifth Circuit Court of Appeals	18

CITATIONS

Cases:

Adderley v. State of Fla., 385 U.S. 39	10
Bauer v. Beto, 5th Cir. 1970, No. 28622	11
City of Greenwood, Miss. v. Peacock, 384 U.S. 808	10, 13
Hamm v. City of Rock Hill, 379 U.S. 306	10
Hurley v. Bennett, 5th Cir. 1970, No. 28612	11
People, State of N.Y. v. Galamison, 342 F.2d 255	10
Rachel v. Ga., 342 F.2d 336, aff'd 384 U.S. 780	10
Schmeltz v. Beto, 416 F.2d 314	14
Texas v. Payton, 389 F.2d 391	15
Townsend v. Sain, 372 U.S. 293	8, 12, 14
Wheeler v. Beto, 407 F.2d 816	15

INDEX (Continued)

Page

Statutes:

Sections 201, 202 and 203 of the Civil Rights Act of 1964 (42 U.S.C.A. Sections 2000(a), 2000(a-1), 2000(a-2) 2, 3, 5, 6, 11, 13, 14

28 U.S.C. 2284(4) 9

Miscellaneous:

5 West's Federal Practice Manual (2d ed), p. 480 11

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No.

C. E. HESTER, et al.,

Petitioners,

versus

ZELMA WYCHE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 25, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is unreported and is printed as Exhibit A attached hereto. The opinion of the District Court is reported in 275 F.Supp. 131.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 28, 1970. Rehearing was denied on October 6, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. Is an evidentiary hearing in federal district court necessary when that court had before it sufficient evidence to determine, and did determine, whether or not the defendant was engaged in exercising a federally protected right?

II. Can a defendant committing a crime of violence be protected by a civil rights shield?

STATUTE INVOLVED

The statutory provision involved is Section 203 of the Civil Rights Act of 1964:

> "No person shall (a) withhold, deny, or attempt to withhold or deny or deprive or attempt to deprive, any person of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title, or (c) punish or attempt to punish any person for exer-

cising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title."

Pub.L. 88-352, Title II, § 203, July 2, 1964, 78 Stat. 244; 42 U.S.C. § 2000a-2

STATEMENT

Respondent Wyche, a Negro, is President of the Madison Parish Voters League, a local organization in Tallulah, Louisiana devoted to securing equal rights for Negro citizens. On July 25, 1965, at approximately 6:00 P.M., respondent and a group of Negroes entered Bill's Highway 80 Truckstop, a place of public accommodation as defined in 42 U.S.C. § 2000a(b), for the purpose of seeking service in compliance with the provisions of the Civil Rights Act. Respondent and the group were voluntarily served by the owner, Mr. Bill Presley, and his employees. During this time, one of the persons seeking service threw an object at a waitress in the restaurant. The record is void of any provocation for such an incident.

That same evening, the Reverend T. H. Turner, a member of the Voters League, told respondent that he had gone to the above named restaurant and had been refused service at a later hour. Acting on this information, respondent and another group of Negroes returned to Bill's to "see what was wrong". This visit took place around ten o'clock on the night in question. Upon arriving at the restaurant, the group found that the lights had been turned out, but people were still inside the restaurant. While there is conflicting testi-

mony whether the restaurant customarily stayed open twenty-four hours a day, the owner testified that he had been requested to close "to keep down trouble", and that he had his employees clean up before closing. According to the owner and the patrons in the restaurant at the time, the front door to the restaurant was locked and a chair had been placed against the door to prevent its opening. There is conflicting testimony as to whether respondent forced his way into the building or whether he opened an already unlocked door and entered peacefully. In either event, after gaining entrance to the restaurant, respondent asked to see the manager but was repeatedly told that the manager was next door at the filling station. He then demanded that the manager be summoned to be confronted with the allegation of non-service to Reverend Turner. During this period of time, respondent and Dr. John Monsell, a patron in the restaurant, became involved in a somewhat heated conversation which resulted in their moving outside the eating establishment. At this time or shortly thereafter, respondent is alleged to have whistled, causing a large crowd of Negroes to form around Dr. Monsell. It was during this sequence of events that Dr. Monsell allegedly received several blows to his body from behind and had his shirt torn. The identity of the person or persons delivering the blows was not ascertained, and it was established by the respondent and admitted by the State that respondent himself did not deliver the blows. At trial of the case in state court without jury, the court found that although respondent had not himself physically committed the battery upon Dr. Monsell, he had *procured* the commission of the same, and un-

der the facts of the case and the law of Louisiana, an accessory before the fact is a principal. Accordingly, the judge found respondent guilty of simple battery.

Respondent petitioned the federal district court for habeas corpus on the ground that he was prosecuted and convicted for conduct that is federally protected from punishment by Section 203 of the Civil Rights Act of 1964. The federal district court denied an evidentiary hearing and dismissed respondent's petition.

On appeal, the circuit court of appeals reversed.

REASONS FOR GRANTING THE WRIT

I.

THE COURT ERRED IN HOLDING THAT THE MERITS OF THE FACTUAL DISPUTE HEREIN WERE NOT RESOLVED IN THE STATE HEARING.

The Court ordered a federal evidentiary hearing on the sole ground that the state hearing had not resolved the merits of Wyche's claim that the State of Louisiana had subjected him to prosecution for acts protected by Section 203 of the Civil Rights Act of 1964.

The Court erred in holding that the state trial court did not resolve the issue whether Wyche was engaged in protected activity at the time of the battery.

The Court erred in holding that there was no finding by the state trial court that Wyche's whistle was a summons to violence and caused the battery.

The Court correctly states that when Section 203 is asserted as a bar to a state prosecution, the test is:

> Was the basis of the state prosecution activity protected by Sections 201 and 202 of the Civil Rights Act?

However, the Court incorrectly holds that there is no finding by the state trial court that Wyche and his group were not at the site of the crime for the purpose of peacefully obtaining the service guaranteed by Sections 201 and 202 of the Civil Rights Act.

The Court is also incorrect in holding that there is no state court finding establishing a connection between Wyche and the battery and no resolution by the trial court of the credibility issue posed by conflicting testimony.

The remarks of the trial court (Transcript pp. 221-222) followed immediately upon the heels of the arguments of the state and defense counsel. (Transcript pp. 215-221) The arguments had noted the conflicting testimony, the trial judge himself mentioned the conflicting testimony, and necessarily implicit in the state trial judge's decision was his resolution of the credibility issue in favor of the witnesses who had testified that Wyche's group was armed and that Wyche's whistle and other actions inflamed the crowd to commit the battery.

In the light of the testimony presented and the arguments of counsel immediately preceding the trial judge's remarks explaining his verdict of guilty, necessarily implicit in the state trial judge's decision was a finding that Wyche and his group were not at the site of the crime for the purpose of peacefully obtaining service from a place of public accommodation and that Wyche's whistle deliberately called for the violent act of battery.

Nothing in the record could conceivably lend itself to the conclusion, erroneously put forth by the Court, that the state trial judge might have found Wyche guilty because of his *mere presence* at peaceful civil rights activities that later got out of hand. The battery took place outside the place of public accommodation. At the time of the battery Wyche was not engaged in attempting to obtain service. In his remarks the trial judge specifically refers to Wyche's whistle which brought the crowd forward to commit the battery. Obviously the trial court found Wyche "responsible" for the battery not because of his mere presence, but because of the deliberate act of signaling the crowd to commit the battery by his whistle.

II.

THE COURT ERRED IN HOLDING THAT IN ORDER TO OBVIATE THE NECESSITY OF A FEDERAL EVIDENTIARY HEARING, THE STATE TRIAL JUDGE WOULD HAVE HAD TO MAKE AN EXPRESS FINDING OF FACT IN PRECISE WORDS THAT AT THE TIME OF THE BATTERY, THE ACCUSED WAS

NOT ENGAGED IN A PROTECTIVE ACTIVITY. THE COURT ERRED IN NOT DETERMINING THAT THE STATE TRIAL JUDGE HAD IMPLIEDLY MADE SUCH A FINDING.

As pointed out above, implicit in the state trial judge's remarks is a finding of fact that Wyche was not at the site of the crime for the purpose of peaceful service and that his whistle did in fact cause the battery.

The Court, however, ignored the necessary implication of the state trial judge's remarks. Because the state trial judge did not expressly spell out such findings of fact, a federal hearing on habeas corpus was ordered.

The Court's requirement of an express finding violates the holding of *Townsend v. Sain*, 372 U.S. 293, wherein the United States Supreme Court stated:

> "Thus, if no express findings of fact have been made by the state court, *the District Court must initially determine whether the state court has impliedly found material facts.*" 83 S.Ct. at 757 (Emphasis supplied)

It is submitted that the state trial court found by necessary implication that Wyche's whistle commanded the battery and that his presence at the scene of the crime was not for the protected activity of obtaining service peacefully.

III.

THE COURT'S CONCLUSION THAT THE MERITS OF THE FACTUAL DISPUTE POSED HEREIN WERE NOT RESOLVED IN THE STATE COURT HEARING AND THAT AN INDEPENDENT FEDERAL EVIDENTIARY HEARING WAS NECESSARY VIOLATES 28 USC SECTION 2254(d) WHICH REQUIRES THE FEDERAL HABEAS CORPUS COURT TO PRESUME TO BE A CORRECT DETERMINATION OF A FACTUAL ISSUE BY A STATE COURT.

The state record shows that the state court found as a fact that Wyche's whistle caused the battery. Under 28 USC 2254(d) the federal court was required to presume this finding to be correct. The Court was not authorized to examine the sufficiency of the evidence.

It is clear from an analysis of the appellate court's opinion that its decision was based on its improper consideration of the sufficiency of the evidence in the state record to prove the connection between Wyche and the battery. The Court confused its unauthorized consideration of the sufficiency of the evidence with a finding that the state court had not resolved the merits of the factual dispute.

IV.

THE COURT ERRED IN SHIELDING THE ACCUSED'S VIOLENT ACT UNDER THE GUISE OF A PROTECTED RIGHT, CONTRARY TO ITS OWN PRIOR HOLDINGS.

"... A balanced evaluation must be made into the *bona fides* of the official and into the legality of the conduct of the minority member. The Supreme Court spoke to this question in the City of *Greenwood* case and by denying certiorari in the Galamison case, enunciated the principle that the unlawful conduct of demonstrators could not be protected by a civil rights shield. *City of Greenwood, Miss. v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966). It was also held that neither the Constitution nor the civil rights statutes created a defense or precluded equal punishment for disturbers of the peace merely because the unlawful conduct took place during the course of protests. *People, State of New York v. Galamison*, 342 F.2d 255, 8 A.L.R.3d 263 (2d Cir. 1965), certiorari denied 380 U.S. 977, 85 S.Ct. 1342, 14 L.Ed.2d 272 (1965).

It was also held that self-help was not encompassed as a remedy in the Civil Rights Act of 1964; nevertheless, peaceful and nonforcible attempts to secure service in public accommodations could not be made the basis of prosecution. *Hamm v. City of Rock Hill, Ark.*, 379 U.S. 306, 85 S.Ct. 384, 13 L.Ed.2d 300, rehearing denied 379 U.S. 995, 85 S.Ct. 688, 13 L.Ed.2d 614 (1965). See also *Rachel v. State of Georgia*, 342 F.2d 336 (5th Cir. 1965), affirmed 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966). A contrary result was reached if malicious intent shown. *Adderley v. State of Florida*, 385 U.S. 39, 87

S.Ct. 262, 17 L.Ed.2d 149 (1966), rehearing denied 385 U.S. 1029, 87 S.Ct. 698, 17 L.Ed.2d 559 (1967)."

5 West's Federal Practice Manual (2d ed) p. 469.

The Court's holding that a federal evidentiary hearing is necessary herein conflicts with its own prior jurisprudence that when the state record furnishes the necessary support for the factual findings on the question at issue, no evidentiary hearing in the federal court is necessary. *Bauer v. Beto* (5th Cir. 1970) ___ F.2d ___ (No. 28633 slip opinion dated March 23, 1970); *Hurley v. Bonnett* (5th Cir. 1970) ___ F.2d ___ (No. 29812 slip opinion dated August 17, 1970)

The Court erred in not finding that the record herein supports the factual findings of both the state trial judge and the federal district judge that at the time of the battery, Wyche was neither seeking service in a place of public accommodation nor engaged in non-forcible conduct.

It is undisputed from the testimony in the record that Wyche did not go to the cafe for service, but to "investigate" a complaint. When there, he got into a personal argument with a customer, not with the manager or any employee. The battery took place outside the cafe, not in it.

As the Court correctly states in its opinion, "the protection of Section 203 extend to those peacefully claim-

ing a right to service in a place of public accommodation", and "the test is what the accused was actually doing".

It is undisputed in the record herein that at the time of the battery, Wyche was not peacefully claiming a right to service in a place of public accommodation. He was outside the cafe engaging in a private argument with an individual who had no connection with the giving of service at the cafe. The battery did not arise out of Wyche's attempt to obtain service at the cafe. The battery arose out of a private argument between Wyche and another individual. It is undisputed from the record that no nexus exists between the battery and any attempt to obtain service in a place of public accommodation. Therefore the protection of Section 203 does not apply. No other conclusion is possible from the testimony in the record.

Alternatively, even assuming arguendo that the protection of Section 203 extended to Wyche while he was arguing outside the cafe with a non-employee of the cafe, he lost that protection once violence entered the picture at his behest.

The record supports the findings of both the state trial judge and the federal district judge that Wyche was not engaged in nonforcible conduct and caused the battery by commanding the crowd to violence by his whistle.

The Court erred in shielding Wyche's act of causing violence under the guise of a protected right.

In so doing, the Court delivered a lethal blow to the ability of local governments to enforce their laws against crimes of violence.

In so doing, the Court opened the gates to anyone convicted of any crime of violence, including rape and murder, to obtain a retrial in federal court merely by claiming in post conviction proceedings that at the time of the crime he was exercising his rights under Sections 201 and 202 of the Civil Rights Act.

Surely, by its decision in *Townsend v. Sain*, supra, the United States Supreme Court did not intend to require a complete retrial of cases of violence such as this.

Surely, by its decision in *City of Greenwood v. Peacock*, 384 U.S. 808, the Supreme Court established the principle that local law enforcement against crimes of violence is not to be thwarted by an unsupported claim that at the time of the crime the perpetrator was engaging in protected civil rights activity.

V.

IN THE ALTERNATIVE, THE COURT ERRED IN REQUIRING AN INDEPENDENT FEDERAL EVIDENTIARY HEARING AFTER THE ACCUSED AND HIS COUNSEL HAD AGREED IN THE FEDERAL DISTRICT COURT TO SUBMIT THE CASE ON THE STATE RECORD ALONE.

Even assuming arguendo that the state judge did not resolve the merits of the factual dispute, the federal

habeas petitioner may waive an evidentiary hearing in federal court and agree to submit the matter on the state record alone. Townsend v. Sain, 372 U.S. 293, 322.

In *Schnautz v. Beto* (5th Cir. 1969) 416 F.2d 214, 215, this Court stated:

> "The district judge was not obligated to hold an evidentiary hearing where, as here, a full and fair hearing had been held during the state court proceedings. The transcript of that proceeding was received in evidence in lieu of an independent hearing."

This is precisely what occurred in the lower federal court in the case at bar (See Appendix pp. 33, 40) Therefore, Wyche waived his right to an independent federal evidentiary hearing, and the appellate court erred in ordering such a hearing.

VI.

IN THE FURTHER ALTERNATIVE, THE COURT ERRED IN HOLDING THAT THE ACCUSED HAD EXHAUSTED HIS STATE REMEDIES.

At no stage in the state court proceedings did Wyche raise the issue that his battery conviction constituted punishment for the exercise of rights guaranteed by Section 201, 202 and 203 of the Civil Rights Act of 1964 (42 USCA Sections 2000 (a), 200 (a-1), 2000 (a-2)).

Neither in the lower state court nor in his petitions for habeas corpus and for certiorari to the state supreme court did Wyche press the issue. The only issues raised by Wyche in the state courts were lack of evidence to support the guilty verdict, the jury issue, and the question of his right to bail.

When Wyche filed for federal habeas corpus, defendants made the defense in their answer (See Appendix p. 26) that Wyche had not exhausted his state remedies. However, the lower federal court dismissed the habeas corpus proceedings on other grounds without passing upon defendants' contention that petitioner had failed to exhaust his state remedies.

Defendants now reurge their contention that federal relief should be denied Wyche for failure to exhaust available state remedies inasmuch as Wyche has failed to show that he has presented his contention concerning Sections 201, 202 and 203 of the Civil Rights Act to the Louisiana courts via habeas corpus proceedings. 28 USC 2254(b); *Texas v. Payton*, (5th Cir. 1968) 390 F.2d 261; *Wheeler v. Beto* (5th Cir. 1969) 407 F.2d 816.

Accordingly, the judgment of dismissal should have been affirmed on the ground that habeas corpus should not have been granted because of Wyche's failure to exhaust state remedies.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General
State of Louisiana

WILLIAM P. SCHULER
Second Assistant Attorney General

DOROTHY D. WOLBRETTE
Assistant Attorney General

THOMPSON L. CLARKE
District Attorney for the
Sixth Judicial District

CERTIFICATE OF SERVICE

I, _____, a member of the bar of the United States Supreme Court, certify that at least three copies of the foregoing petition for certiorari have been served on the adverse party by depositing same in a U.S. mail box, with first class postage prepaid, or with airmail postage prepaid where counsel resides 500 miles or more from New Orleans, addressed to counsel of record as follows:

Richard B. Sobol, Esq.
1823 Jefferson Place, N.W.
Washington, D.C. 20036

Alvin J. Bronstein, Esq.
78 Mt. Auburn Street
Cambridge, Massachusetts

Anthony G. Amsterdam, Esq.
Stanford Law School
Palo Alto, California

Colins, Douglas & Elie
344 Camp Street
New Orleans, Louisiana 70130

George M. Strickler, Jr., Esq.
600 Common Street
New Orleans, Louisiana 70130

New Orleans, Louisiana, this ____ day of December, 196__.

_____

Assistant Attorney General

EXHIBIT A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28215

ZELMA C. WYCHE,
Petitioner-Appellant,

versus

C. E. HESTER, ET AL.,
Respondents-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

---

(August 25, 1970)

Before COLEMAN, GOLDBERG and MORGAN, Circuit Judges.

GOLDBERG, Circuit Judge: Things were anything but tranquil on July 28, 1966, at Bill's Highway 80 Truck-stop in Tallulah, Louisiana. The events of that evening grew out of the civil rights activities of appellant Zelma C. Wyche. Wyche, a Negro, was president of the Madison Parish Voters' League, an organization devoted to securing equal rights for Negroes.[1] In furtherance

---

[1]Wyche is now the Chief of Police in Tallulah.

of this purpose Wyche and a group of Negroes went to Bill's Highway 80 Truckstop, a place of public accommodation as defined in the Civil Rights Act of 1964, seeking service in compliance with the provisions of that Act. The group was voluntarily served on this occasion and departed. That same evening, however, the Reverend T. H. Turner, another member of the Voters' League, informed Wyche that he had later been refused service at the restaurant. Acting on this information, Wyche and his group returned to the restaurant at approximately 10:00 p.m. to investigate. Wyche entered the restaurant, accompanied by some of the group, and asked to see the manager. He was informed that the manager was outside at a filling station. Wyche apparently then requested that the manager be summoned to explain the refusal to serve Reverend Turner. During this time Wyche and Dr. John Monsell, a white patron of the restaurant, became involved in a somewhat heated conversation which resulted in their adjournment to the parking lot in front of the restaurant. At this point the evidence becomes conflicting, but it appears that during the ensuing confusion Dr. Monsell was struck from behind by someone in the crowd. The identity of the person or persons who delivered the alleged blow or blows was not ascertained. It is undisputed, however, that Wyche himself did not strike Dr. Monsell.

The disturbance of that night led to two state prosecutions against Wyche. The first, an aggravated burglary prosecution, was before this court in *Wyche v. Louisiana*, 5 Cir. 1967, 394 F. 2d 927, where we held that Wyche was entitled to a hearing in federal court

on his petition to remove the state prosecution to the federal district court under 28 U.S.C.A. § 1443. The second, a simple battery prosecution, is the subject of this appeal.

Wyche was brought to trial in a Louisiana state court on September 28, 1966, on a charge of simple battery as defined in La. Rev. Stat. Ann § 14:35.[2] The trial judge, sitting without a jury, found on the basis of disputed testimony that a battery had been committed upon Dr. Monsell and that Wyche was "responsible" for it. He therefore found Wyche guilty of simple battery. For this offense Wyche was sentenced to four months in prison and fined $200 plus costs.

After exhausting his state remedies Wyche filed a petition for habeas corpus in the court below, alleging among other things that his Louisiana conviction constituted punishment for the exercise of rights guaranteed by Sections 201 and 202 of the Civil Rights Act of 1964, 42 U.S.C.A. § § 2000a, 2000a-1, which punishment is prohibited by Section 203 of that Act, 42 U.S.C.A. § 2000a-2. Wyche also contended that his trial in the Louisiana court without the right to a trial by jury violated his rights under the Sixth and Fourteenth Amendments. In considering the petition the district court examined the transcript of the state proceedings,

---

[2]La. Rev. Stat. Ann. § 14:35 provides:

> Simple Battery
>
> Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon.
>
> Whoever commits a simple battery shall be fined not more than three hundred dollars, or imprisoned for not more than two years, or both.

but the court did not hold an evidentiary hearing. The court denied the petition, *United States ex rel. Wyche v. Hester*, W.D. La. 1967, 273 F.Supp. 131, and from that decision Wyche now appeals to this court.

I.

Considering Wyche's jury trial contention first, we note that under Louisiana law simple battery is a misdemeanor punishable by a maximum of two years imprisonment and a $300 fine. La. Rev. Stat. Ann. §14:35. At the time of appellant's trial Louisiana did not afford an accused the right to trial by jury for such an offense. In his habeas corpus petition Wyche contended that the denial of the right to a jury trial in such a prosecution violated the due process clause of the Fourteenth Amendment. This contention was later sustained by the United States Supreme Court in *Duncan v. Louisiana*, 1968, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491. However, in *De Stefano v. Woods*, 1968, 392 U.S. 631, 88 S.Ct. 2093 20 L.Ed.2d 1308, the Court held that the *Duncan* decision would not be applied to any case in which the trial began prior to May 2, 1968, the date of the *Duncan* opinion. Appellant's trial in the Louisiana court began on September 28, 1966, a time substantially in advance of this magic date. It is clear that appellant's jury trial claim is thus foreclosed by the Supreme Court's ruling in *De Stefano* which admits of no apparent exceptions to its rule of non-retroactivity. We therefore conclude that appellant's Louisiana conviction for simple battery may not be set aside because of that state's refusal to afford him a jury trial.

II.

Wyche's second contention is that his state conviction for simple battery violated Section 203 of the Civil Rights Act of 1964, which prohibits any state from punishing or attempting to punish a person for exercising or attempting to exercise any right or privilege secured by Section 201 or 202 of the Act.[3] One of the statutory rights secured by Section 201 is the right of every person to the "full and equal enjoyment" of places of public accommodation without discrimination on the ground of race.[4]

It is now well established that the protections of Section 203 extend to those peacefully claiming a right to serve in a place of public accommodation. In speaking to this question the Supreme Court

---

[3]Section 203 of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a-2, provides:

> No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title.

[4]Section 201(a) of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a(a), provides:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

in *Hamm v. City of Rock Hill*, 1964, 379 U.S. 306, 85 S.Ct. 384, 13 L.Ed.2d 300, explained:

> "Title II includes several sections, some of which are relevant here, that create federal statutory rights. The first is § 201(a) declaring that '[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation,' which as we have found includes the establishments here involved. Next, § 203 provides:
>
> > " 'No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) *punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.*' [Emphasis by the Supreme Court].
>
> "On its face, this language prohibits prosecution of any person for seeking service in a covered establishment, because of his race or color. It has been argued, however, that victims of discrimination must make use of the

> exclusive statutory mechanisms for the redress of grievances, and not resort to extralegal means. Although we agree that the law generally condemns self-help, the language of § 203(c) supports a conclusion that nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a 'right or privilege' secured by its earlier provisions. The availability of the Act as a defense against punishment is not limited solely to those who pursue the statutory remedies. The legislative history specifically notes that the Act would be a defense to criminal trespass, breach of the peace and similar prosecutions." 379 U.S. at 310-311 (footnote omitted).

Later in *Georgia v Rachel*, 1966, 384 U.S. 780, 86 S.Ct 1783, 16 L.Ed.2d 925, the Court reiterated its earlier position:

> "...The removal petition may fairly be read to allege that the defendants will be brought to trial solely as the result of peaceful attempts to obtain service at places of public accommodation. The Civil Rights Act of 1964 endows the defendants with a right not to be prosecuted for such conduct. As noted, § 201(a) guarantees to the defendants the equal access they sought. Section 203 then provides that, 'No person shall ... (c) punish or *attempt to punish* any person for exercising

> or attempting to exercise any right or privilege secured by section 201 or 202.' [Emphasis by the Supreme Court]. 78 Stat 244. In Hamm v City of Rock Hill, 379 US 306, 311, 13 L ed 2d 300, 304, 85 S Ct 384, the Court held that this section of the Act 'prohibits prosecution of any person for seeking service in a covered establishment, because of his race or color.' " 84 U.S. at 793 (footnote omitted).

It is also well settled that the Section 203 privilege against state prosecution may be asserted prior to the state trial by removal to the federal court under 28 U.S.C.A. § 1443(1). *Georgia v. Rachel, supra.* Alternatively, one aggrieved by a state prosecution may wait until after the state conviction is final and then, as appellant has chosen to do here, attempt to vindicate Section 203 rights in a federal habeas corpus proceeding to overturn the state conviction. *Tolg v. Grimes*, 5 Cir. 1966, 355 F.2d 92. It is perfectly obvious that when the removal procedure is used, the federal court must hold an evidentiary hearing to determine whether or not the removal applicant was actually engaged in activities protected under Section 203. *Georgia v. Rachel, supra; Walker v. Georgia*, 5 Cir. 1969, 417 F.2d 5 (Mardon Walker II); *Walker v. Georgia*, 5 Cir. 1969, 417 F.2d 1 (Mardon Walker I); *Walker v. Georgia*, 5 Cir. 1969, 405 F.2d 1191 (Jerry Walker); *Wyche v. Louisiana*, 5 Cir. 1967, 394 F.2d 927.

Appellant here contends that in every case where the habeas corpus alternative is chosen, the same sort of federal evidentiary hearing is required despite the

fact that, unlike the removal procedure, a full state hearing has already been held. We cannot agree with appellant's contention. The necessity for an evidentiary hearing in habeas corpus cases arising out of civil rights activities is governed by the same factors that apply to any other habeas corpus proceeding brought to test the validity of a state conviction. In *Townsend v. Sain*, 1963, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770, the Supreme Court announced the rules which determine the necessity for a federal evidentiary hearing in such proceedings:

> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: if (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." 372 U.S. at 313.

Applying these standards, we conclude that Wyche was entitled to a federal evidentiary hearing on his allegation that the State of Louisiana subjected him to prosecution for activities protected by Section 203.

Under *Townsend v. Sain* a federal district court in a habeas corpus proceeding must hold an evidentiary hearing if the merits of the factual dispute were not resolved in the state hearing. The factual dispute when Section 203 is asserted as a bar to a state prosecution is whether the person involved was engaged in protected activity at the time he committed the offense which forms the basis of the state prosecution. In the present case the state trial court did not resolve this issue. That court did not mention the appellant's activity or the activities of those accompanying appellant regarding their efforts to integrate Bill's Highway 80 Truckstop. There is no finding by the state court that appellant and his group were not there for the purpose of peacefully obtaining service for Negroes from that establishment, an activity clearly protected by Section 203 of the Civil Rights Act.

The mere fact that Wyche was charged with a crime of violence as a result of these activities is not in itself sufficient to prove that he was beyond the pale of Section 203 protection because of non-peaceful acts. This court has repeatedly held that in a proceeding to determine whether a person was engaged in a protected activity under Section 203, the test is what the accused was actually doing with respect to the exercise of his federally protected rights, not the appellation which is attributed to his attempted exercise of the rights by a state prosecutor. *Walker v. Georgia* (Mardon Walker II), *supra; Walker v. Georgia* (Mardon Walker I), *supra; Walker v. Georgia* (Jerry Walker), *supra; Wyche v. Louisiana, supra.*

Moreover, the fact that the state trial court found Wyche *guilty* of a battery under state law does not necessarily mean that he was outside the area protected by Section 203. We note that the state did not even claim that appellant himself struck Dr. Monsell. Indeed, the evidence was uncontradicted that he did not. Rather, appellant was charged with *procuring* a battery, which under Louisiana law makes him liable for punishment as a principal.[8] The trial court found that a battery had been committed and that appellant was "responsible" for it. Thus appellant was found vicariously culpable for the violent acts of other undetermined parties. The trial court did not explain how this "responsibility" on the appellant's part arose. There was evidence that appellant whistled and the crowd gathered around Dr. Monsell as if the whistle was a command. There was other evidence that no whistle was heard. Still other witnesses testified that the whistle was to get the crowd's attention to prevent harm to Dr. Monsell. The trial court never resolved this factual dispute by finding exactly how appellant procured the alleged battery on Dr. Monsell. Further, we are unable to tell whether the trial court believed that appellant's whistle caused the battery or whether it merely stopped a battery already in progress. Consequently, it is impossible to determine whether the

---

[8]La. Rev. Stat. Ann. § 14:24 provides:

> Principals
>
> All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

trial court found appellant "responsible" for the battery because appellant called together a crowd for peaceful civil rights activities which later got out of control, or whether appellant's "responsibility" had its origin in a deliberate act by appellant ordering others to commit a battery on Dr. Monsell.

It is clear that there must be some violent and nonpeaceful act on the part of appellant himself before the Section 203 protections are forfeited. One does not lose Section 203 protections by merely organizing a group and being present where others in the group engage in independent acts of criminal activity In *Walker v. Georgia* (Mardon Walker II), *supra*, we said:

> "Even if uncontradicted evidence were to support a finding that there were 'independent acts of vandalism' that finding could not support the charge against these two appellants, that they, — 'being motivated by common intent and purpose to unlawfully disturb and disrupt the operation of Leb's, did aid, abet, counsel, assist, direct and command the demonstration to wilfully, maliciously, violently, tumultuously and unlawfully enter Leb's for malicious mischief and other acts against public order.' " 417 F.2d at 10.

In the instant case the state factfinding was deficient because no clear finding established a nexus between appellant and the alleged battery. In other words, the trial court did not clearly find that Wyche did commit

a definite known act of violence. Without such a finding we are unable to tell whether appellant was engaged in activities protected by Section 203 or whether by some act of violence on his part he took himself outside the protected area. We are not concerned with the non-kinetics of Louisiana battery law as such, but there must be a determination as to whether or not the alleged semaphoric message was violent in fact or whether Wyche was acting in furtherance of Section 203 rights.

The district court held no evidentiary hearing on this matter. Rather, that court examined the state court record and concluded from the cold record that appellant and his group were not engaged in Section 203 activities because they came to the restaurant as an armed mob, not as peaceful seekers of service at a place of public accommodation. The crux of our problem is whether the district court was in error in making such a finding from the state court record when the state factfinder had made no such finding. We conclude that the district court was in error. The evidence regarding the activities of appellant and his group was in much dispute. Some witnesses testified that the members of the Voters' League group were armed; others denied this but claimed that those in the restaurant were armed. Some testified that Wyche inflamed the crowd; others testified that he was attempting to quiet them. The state trial court did not resolve this credibility issue. Under the principles announced by the Supreme Court in *Townsend* this situation calls for a federal evidentiary hearing. In speaking to this very question the Court in Townsend said:

> "On the remand it would not, of course, be sufficient for the District Court merely to hear new evidence and to read the state-court record. Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure, the state-court record is competent evidence, and either party may choose to rely solely upon the evidence contained in that record, but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues. This was not done here." 372 U.S. at 322 (footnote omitted).

We conclude that Wyche was entitled to a federal evidentiary hearing to determine whether or not on the night in question he was engaged in activities protected under Section 203. In making such a determination it should be borne in mind that Louisiana is not at liberty to make criminal those activities which Section 203 of the Civil Rights Act confers as a right. It follows that aiding, abetting, counseling, or procuring acts of violence must be proved by direct evidence if they are to remove one from the protection of Section 203. The mere presence of a person at a protected activity cannot be used to hold him vicariously culpable for the independent and unprotected violent acts of others. On remand the state conviction must be set aside unless there is evidence presented to justify a finding that Wyche directly counseled, commanded,

ordered, or solicited the alleged battery on Dr. Monsell and thereby withdrew himself from the protections of Section 203 of the Civil Rights Act.

REVERSED and REMANDED for proceedings not inconsistent with this opinion.

COLEMAN, Circuit Judge, concurring in part and dissenting in part.

I concur in that portion of the majority opinion which holds that Wyche was not, at the time of his trial, entitled to a jury.

I regret the necessity for emphatically dissenting to the remainder of the majority opinion holding that Wyche is entitled to an evidentiary hearing. That regret is sharpened by the belief that the majority inflicts an unwarranted Sunday punch to the already sagging ability of local governments to enforce their laws against crimes of violence.

I think this case should have been affirmed on the able (and, in my opinion, unassailable) opinion of the District Court, 372 F. Supp. 131.

I would deny an evidentiary hearing for two reasons: (1) Wyche and his counsel agreed in the court below to submit this case on the complete record of the state court trial, where Wyche was represented by counsel and gave his own version of the attack on Dr. Monsell; (2) To me, it is unmistakably obvious that at the time of the battery in question Wyche was not engaged in a protected activity.

In his testimony in the State Court Wyche admitted three times that he did not go to the truck stop to obtain service [Page 183, et seq. of the state trial transcript]. It is undisputed that Wyche got into a personal controversy with a patron in the building. It is undisputed that the battery was committed outside the cafe — not in it. It is undisputed that the management took no part in the Wyche - Monsell controversy.

Wyche went to the truck stop to "investigate" a complaint by a third party that the he had been denied service. He admitted that he took along fifty or seventy five others. There was testimony that some of these were armed, and displayed their weapons.

There was abundant proof that when Wyche entered the cafe he asked for the manager. He was told that the manager was at the adjacent filling station. He demanded that the manager be sent for. Monsell, a customer, suggested that if Wyche wanted to see the manager that he go over to the filling station. Wyche asked Monsell "What is it to you"? One word brought on another and Wyche asked Monsell, "Do you want your —— whipped"? Monsell asked, "Who is going to do it, you"? Wyche replied that he "would have it done", stuck his head out the door, and gave two shrill whistles by placing his hands to his mouth. Monsell attempted to leave but those accompanying Wyche rushed up, cut him off from his vehicle, and kicked him over the kidneys and in the seat of his pants. To me, it is useless for this Court to say that Wyche did not personally strike Monsell; that he caused it to be

done is indisputably obvious, as the state trial judge found.

The altercation was quickly stopped by another customer, James Earl Shrivers, who obtained a shotgun and prepared for action, whereupon the self-appointed "investigators" precipitately lost interest in the matter and fled the scene. I would suggest that Shrivers had as much right to quell the violence as Wyche had to precipitate the attack.

I say, with all the conviction of which I am capable, that this is simply too much to shield under the guise of a "protected right", which in fact did not exist, and I do not overlook the fact that Wyche and his counsel made no effort to remove this case to the federal courts for trial on the merits when the prosecution was begun, as they could have done under decisions known to every "civil rights" lawyer.

I heartily agree with the statement of the District Court, 273 F. Supp. at 136, "Surely the Supreme Court never intended to require a complete re-trial of cases *of violence such as this*".

I object to requiring any further proceedings in this case.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28215

ZELMA C. WYCHE,
Petitioner-Appellant,
versus

C. E. HESTER, ET AL.,
Respondents-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Aug. 25, 1970, 5 Cir., 1970, ____ F.2d ____).

(October 6, 1970)

Before COLEMAN, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35

Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

COLEMAN, Circuit Judge, dissents.